

**Concurring Opinion
of
Commissioner Joan D. Aikens
to
Advisory Opinion 1993-24**

I reluctantly voted to approve Advisory Opinion 1993-24, not because I agreed totally with its result, but because it tracked the language of the recently promulgated regulations at 11 CFR §§ 100.8(b)(4)(iv), 114.1(e) and 114.7. After many months of discussion, comments and a hearing followed by more discussion, the Commission, on August 12, 1993, sent to Congress the final rules, and the explanation and justification, for the new definition of "Member" for purposes of Membership Associations. While I was opposed to several provisions in the final rules, I approved the regulations on the final vote, in large part because of the inclusion of language providing solicitation rights to Cooperatives - something I had been attempting to accomplish for over 15 years.

In drafting the regulations, the General Counsel's office cited the Supreme Court decision in Federal Election Commission v. National Right to Work Committee, 459 U.S. 197, 103 S.Ct. 552 (1982), 74 L.Ed.2d 364, (NRWC) as the basis for the proposed changes. However, the NRWC decision was structured for an organization whose articles of incorporation and by-laws explicitly disclaimed the existence of members. The Court was thus without a basis for setting forth a clear definition of members in NRWC. However, since NRWC had no provision for members, the Court found it was not necessary to define "members" in order to decide this case. The Court ruled:

There may be more than one way under the statute to go about determining who are "members".... However, on this record we are satisfied that NRWC's activities extended in large part, if not in toto, to people who would not be members under any reasonable interpretation of the statute. (Citation omitted, emphasis in original).

FEC v. NRWC, 459 U.S. 211, 103 S.Ct. 561 (1982).

The legislative history gave very little guidance to either the Court or the Commission with regard to what or who is a member of a Membership organization. The sole reference to 2 U.S.C. § 441b(b)(4)(C) in the 1976 Amendments was addressed by Senator Allen in a floor statement supporting his amendment to include Membership organizations. He explained that his amendment would:

allow corporations that do not have stock but have a membership organization, such as a cooperative or other corporations without capital stock and, hence, without stockholders, to set up separate segregated political funds as to which it can solicit contributions from its membership; since it does not have any stockholders to solicit, it should be allowed to solicit its members. 122 Cong. Rec. 7198 (1976).

FEC v. NRWC, 459 U.S. 204, 103 S.Ct. 557 (1982).

The Court further noted that, based on the legislative history, nonstock corporations could also be defined by analogy to members of unions and stockholders of business corporations. This, the Court stated, "suggests that some relatively enduring and independently significant financial or organizational attachment is required to be a 'member'...." Id. at 204, 103 S.Ct. at 558 (emphasis added).

Non-stock corporations are not like either unions or corporations but are, rather, a blending of the organizational structure of unions and corporations. Following the Court's analysis of NRWC's arguments, it found in favor of the FEC because:

[T]he solicitation letters themselves make no reference to members. Members play no part in the operation or administration of the corporation; they elect no corporate officials, and indeed there are apparently no membership meetings. There is no indication that NRWC's asserted members exercise any control over the expenditure of their contributions... We think that under these circumstances, those solicited were insufficiently attached to the corporate structure of NRWC to qualify as "members"....

FEC v. NRWC, 459 U.S. at 206, 103 S.Ct. at 558, 559.

From this rather scanty base the Commission crafted regulations that required an organization's by-laws to expressly provide for members, expressly solicit for members, and expressly acknowledge membership. These provisions, I believe, follow the direction of the Court and the intentions of the Congress in the 1976 Amendments. While they may be somewhat burdensome for some organizations, they do give real and explicit guidance on who the FEC would consider members for purposes of the Federal Election Campaign Act (FECA). However, the Commission went beyond these clear phrases to set further restrictions on the definition. Through several advisory opinions and the first drafts of these regulations, the "or" changed to "and/or" and eventually to simply "and" in the final regulations. Therefore, the Commission had to define the phrases "significant organizational attachment" and "significant financial attachment" as two distinct requirements. This interpretation resulted in the provision citing "voting rights" as a mandatory criterion of organizational attachment without which solicitation is prohibited.

During discussions of the regulations, I stated my objection to the "voting rights" provision. Issue oriented membership organizations have many different structures. Individuals join these organizations because they believe in the cause or because they want to be heard on an issue that is important to them. The fact that an individual makes the personal decision to join, pays whatever dues are required, is recognized by the organization as a member, and has organizational or financial ties to the organization should be enough to meet the definition of "member". I further stated that the restrictive language regarding "voting rights" would lead to more advisory opinion requests which, in turn, would lead to more regulations and more restrictions on who can be solicited.

This Advisory Opinion Request from the National Rifle Association (NRA) is the first Advisory Opinion Request under the new regulations and all my fears about the effect of these new and purportedly "less restrictive" provisions are becoming reality. In the practical application of the "voting rights" provision to this organization, we clearly see that it is impractical. This provision unfairly prohibits solicitation of and communication with a vast portion of those individuals who consider themselves members and who the organization has considered members for over ten years. These individuals have every other benefit and right of membership except the right to vote for a member of the governing body, i.e., they pay regular

dues, receive regular publications, may attend all membership and Board meetings except the executive committee meetings, may nominate anyone for the Board of Directors, and may serve on all committees, except the nominating and executive committees. In deciding MUR 1765, the Commission sanctioned NRA's right to both solicit and communicate with these members because they had those rights and benefits. To now prohibit them from soliciting and communicating with two-thirds of their membership will surely be subject to constitutional challenge.

I believe that NRA has proven that there is a sufficient attachment to the corporate structure. The right to vote for a member of the governing board is only one way of providing that attachment and should not prevent them from soliciting their members. For these reasons, I had a great deal of difficulty voting for Advisory Opinion 1993-24. I did so only because it follows the regulations approved by the Commission, even if I do not agree with the "voting rights" provision, and because I believe this issue will eventually be decided by the Courts.

Finally, let me just say that it has always been a stated goal of the FEC to build public confidence in the political process. However, I do not believe we can build that confidence if we devise a system that keeps segments of the public from participating. We should do everything possible, under the statute and Court decisions, to encourage broad participation by all segments of our society in the process of selecting, electing and petitioning our political leaders without infringing on the protected rights of free speech and association under the Constitution.

Feb. 10, 1994
Date

Joan D. Aikens
Joan D. Aikens, Commissioner